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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

VERN WEBER,
Petitioner,

vs.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT,
WILLIAM A. STRESHLY, and JAMES C. O'CONNOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a public school employee's truthful and non-disruptive statement to the press about the operations of the School District touch upon a matter of public concern under the First Amendment, in the context of an earlier newspaper article identifying the employee as a whistleblower on the School District's deceitful budget practices?

2. If so, does the First Amendment's protection disappear if the employee has a personal grievance with the School District?

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

Petitioner, VERN WEBER, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California District Court of Appeal ruling that Mr. Weber's statements to the press did not touch upon matters of public concern under the First Amendment.

REPORTS OF OPINIONS BELOW

The published opinion of the California District Court of Appeal, 20 Cal.App.4th 1054, filed December 7, 1993, is reprinted in the Appendix at A-1.

The Court of Appeal's opinion was depublished by order of the California Supreme Court, filed March 17, 1994. That order is reprinted in the Appendix at A-2.

The unpublished decision of the Contra Costa County Superior Court filed December 19, 1991 is reprinted in Appendix at A-3.

LIST OF PARTIES

The names of all parties to the proceeding are: Vern Weber, Plaintiff and Petitioner, and San Ramon Valley Unified School District, William A. Streshly, and James C. O'Connor, collectively Defendants and Respondents. There are no parent or subsidiary corporations related to any party.

JURISDICTION

The California Supreme Court denied review of the District Court of Appeal's decision by order filed March 17, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments 1 and 14 to the United States Constitution, as well as 42 U.S.C. § 1983, are reprinted in the Appendix at A-4.

STATEMENT OF THE CASE

The California Superior Court, County of Contra Costa, had jurisdiction under the Civil Rights Act, pursuant to 28 U.S.C § 1343(a)(3) and *Martinez v. California*, 444 U.S. 277, 283 n.7. (1980).

A. STATEMENT OF THE FACTS

Vern Weber was Director of Management Services for the San Ramon Valley Unified School District, one of the District's top five senior managers. See the opinion below, 20 Cal.App.4th 1054, 1057 (1993). In late 1988, Superintendant William Streshly deliberately inflated Mr. Weber's enrollment projection, so as to create the false appearance of a balanced budget for the upcoming school year. *Id.* "In two confidential memoranda written late that year to School District management, Weber predicted that the inflated projection would lead to a substantial [budget] deficit for the next school year." *Id.*

On June 27, 1989, the substantial budget deficit materialized, and a news reporter for the *San Ramon Valley Times* telephoned Superintendant Streshly to determine the reason for the deficit. 20 Cal.App.4th at 1058. Rather than answer the reporter himself, the Superintendant passed the telephone to Mr. Weber, who truthfully stated that Mr. Streshly had intentionally inflated Mr. Weber's enrollment projections to create the false appearance of a balanced budget. *Id.* "The next afternoon, [Assistant Superintendant] O'Connor asked Mr. Weber to resign his position and take a consulting role with the School District." *Id.* Two days later, the reporter's article appeared in the *Times,* portraying Mr. Weber as having blown the whistle on the Superintendant's deceitful budget. *Id.* The headline stated in bold letters, "Streshly Cited for Deficit" and continued in lower type, "Facilities Director [Weber] Says Funds Were Inflated."[1] *Id.* Later that same day, Mr. O'Connor visited Mr. Weber's office and demanded that he resign. *Id.*

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[1] Pursuant to Supreme Court Rule 14.1.(k)(v), the newspaper article of June 30, 1989 [CT 327-328 of the Clerk's Transcript on appeal] and the followup article of October 24, 1989 [CT 339 of the Clerk's Transcript on appeal] are reprinted in the Appendix at A-5 and A- 6, respectively.

Mr. Weber agreed to resign and take a job as a consultant with the School District, but he refused to agree to a proviso that "neither party may make any other public statement" about the circumstances of Mr. Weber leaving the School District. 20 Cal.App.4th at 1059. Mr. Weber had made many public statements before this time, having been quoted in the newspaper at least once a week while he was employed at the School District. 20 Cal.App.4th at 1058; see also RT 625:19-23.[2] When the reporter who had written the June 30 front page article learned of Mr. Weber's resignation, she telephoned him to find out why. *Id.* at 1059. Mr. Weber truthfully "told her 'that he was being forced to leave the school district,' that he had been asked to sign a document prohibiting him from talking 'about his leaving the school district or anything like that,' that he was never told 'why he was being let go,' and that 'he was concerned about what would happen to the facilities department . . . [because] there was nobody in the school district with his particular expertise in this area.' " *Id.* at 1059. A newspaper article was published on October 24, 1989, reporting these portions of Mr. Weber's interview with the reporter. *Id.* at 1059.

Upon publication of the October 24, 1989 article, the School District retaliated against Mr. Weber by reneging on the consulting agreement and terminating his employment, offering as a pretext, "lack of work and/or funds." *Id.* at 1059. "At trial, [Assistant Superintendant] O'Connor characterized Weber as a 'victim of the October 24, 1989 article.' " *Id.* at 1060.

Mr. Weber then filed suit in Contra Costa Superior Court. He went to trial on two theories: wrongful termination in violation of the California Education Code and

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[2] "RT" refers to the Reporter's Transcript below.

violation of his First Amendment rights of free speech under the Civil Rights Act, 42 U.S.C. Section 1983.

B. THE TRIAL COURT'S FIRST AMENDMENT RULING AND THE JURY'S VERDICT

Ruling on a motion *in limine,* the Superior Court found that Mr. Weber's newspaper interview, as reported in the October 24 *Times*, was protected by the First Amendment. The jury returned a special verdict finding the School District liable on both the wrongful termination claim under the Education Code and the civil rights cause of action. The trial court then awarded attorney's fees to Mr. Weber under the Civil Rights Attorney's Fees Act.

C. THE DISTRICT COURT OF APPEAL'S DECISION

The Court of Appeal affirmed the judgment for wrongful termination under the California Education Code. However, the Court of Appeal reversed on the civil rights cause of action, holding that, as a matter of law, (1) Mr. Weber's truthful statement to the press that he was forced out of his job at the school district; (2) his statement that the school district had attempted to gag him from speaking to the public about the district; and (3) his statement that his departure from the school district, in the context of the recent departure of two other top managers, raised his concern for the welfare of the school district, did not touch upon matters of public concern under the First Amendment. 20 Cal.App.4th at 1062-1065. The court characterized Mr. Weber's press interview as a "mere extension of a personal grievance" as to which the First Amendment has no application. As a result, the Court of Appeal reversed the award under the civil rights act. 20 Cal.App.4th at 1064-1065.

REASONS FOR GRANTING THE WRIT

The writ should be granted to resolve a serious conflict among the lower courts under the free speech clause of the First Amendment, as applied to public employees. There are no non-Constitutional issues that might serve as an adequate and independent ground for disposition of the case without resolving the First Amendment issue.

The Court below committed an error of federal Constitutional law that this Court should not allow to stand. The issue presented — the First Amendment free speech rights of public employees — affects millions of Americans. Moreover, the entire public relies on the exercise of that freedom as a source of information that makes the right to vote an informed and meaningful one. It is the quintessential institutional function of this Court to protect the Constitutional rights of individual citizens and to preserve the integrity of the electoral mechanism of democratic politics. The conflict in the cases suggest that this is an area of law badly in need of the authoritative voice of this Court. Here, the California Court seriously misinterpreted this Court's decision in *Connick v. Myers,* 461 U.S. 138 (1983) as to what speech touches upon a matter of public concern under the First Amendment.

The decision of the court below reflects the conflict prevailing among the lower courts. Most significantly, the decision creates an intra-California conflict between the decision law in California state courts and that of the Ninth Circuit with respect to an issue of federal law. Given the concurrent jurisdiction provided by 28 U.S.C. § 1343(a)(3), this conflict in substantive law forebodes forum shopping of the worst kind. This intra-California conflict is reflective of the conflict among the federal circuit court decisions. Compare, e.g., *Allan v. Scribner,* 812 F.2d 426 (9th Cir. 1987) with *Murray v. Gardner,* 741 F.2d 434

(D.C. Cir. 1984), both cited in the decision below, 20 Cal.App.4th at 1063.

1. THE LOWER COURT'S RULING CONFLICTS WITH *CONNICK v. MYERS* IN FOUR IMPORTANT WAYS WITH RESPECT TO THE QUESTION PRESENTED FOR REVIEW

(A) *Not an interoffice grievance.* Of the many cases that this Court has decided in this area,[3] every one could be characterized, in a sense, as an "interoffice grievance," because each case involves some sort of a dispute between a public employee and her government employer. That is not, however, what the *Connick v. Myers* Court meant by the term "interoffice dispute." *Connick* has no application to speech that is purposely directed to the general public (in this case, to a newspaper reporter). See *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968) (public employees may not "Constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operations of the public [entity] in which they work.") This kind of speech is not properly viewed as an "interoffice grievance."

(B) *Not a mere extension.* The decision of the California Court of Appeal further conflicts with *Connick* by characterizing, as a "*mere* extension" of an interoffice grievance, speech by a public employee that possesses both an element of personal grievance and an expression of public concern. This is not the common English usage of the adjective,

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[3] See *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Perry v. Sinderman,* 408 U.S. 593 (1972); *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977); *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979); and *Rankin v. McPherson,* 483 U.S. 378 (1987). See also *Waters v. Churchill,* No. 92-1450, currently pending before this Court.

"mere," nor is it consistent with the right of free speech under the First Amendment. If the District Court of Appeal's view of a "mere extension" were adopted, citizens would be deprived of information important to their function as voters, based on the irrelevant vagaries of the communicating public employee's motivation. As discussed below, this aspect of the California decision is in conflict with the decisions of several federal circuit courts.

(C) *The public's interest has been overlooked.* The opinion below conflicts with *Pickering v. Board of Education,* 391 U.S. 563 (1968) by failing to account for the public's interest in learning what public employees have to say about management of the public's business, in this case, the public schools. This Court has recognized that public employees are a key source of information that is essential to the informed exercise of the voting franchise. *Pickering v. Board of Education,* 391 U.S. at 572, 574 (public school employees "are, as a class, the members of a community most likely to have informed and definite opinions" about the operations of the school district and it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting [such] speech.") Here, Mr. Weber suffered retaliation for communicating information that was needed by the people to cast their ballots in an informed way, both in school board elections and in votes on school finance issues.

This is the core purpose of the First Amendment, which at its heart

> "has a structural role to play in securing and fostering our Republican system of self-goverment. Implicit in this structural role is not only 'the principle that debate on public issue should be uninhibited, robust, and wide open', but also the antecedent assumption that valuable

> public debates — as well as other specific behavior — must be informed."
>
> *Richmond Newspapers v. Virginia,* 448 U.S. 555, 587-88 (1990) (Brennan, J., concurring).

The effect of the decision below is to sow confusion in an area where bright lines are most needed by both employers and employees. The law of qualified immunity under § 1983, for example, is based on what is objectively knowable by a public official. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Public employees also need a clear and objective standard, not only to know the extent to which they may freely exercise their own speech rights on controversial issues, but also to avoid excessive self-censorship that would deprive the public of information about the workings of their government. *Pickering v. Board of Education*, 391 U.S. 563, 572, 574 (1968) (dismissal from public employment is a potent means for inhibiting free speech). Unless a public employee can determine, with some certainty, to what extent she may speak truthfully with the press about the public's business, then that employee may censor herself in order to avoid retaliation. This Court has long recognized the potential "chilling effect" that vague standards may impose on the exercise of free speech rights. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486-487 (1965).

Simply put, if a public employee knows that she can lose her job by responding truthfully to questions from the press about wrongdoing in government, then she will likely remain silent when questioned. A key source of information about government will disappear, and the general public will be deprived of information that is critical to the democratic administration of public schools. The losers will be:

— *every voter*, who will be less informed when going into the election booth to vote for the school board or on a school finance issue;

— *every parent*, who will be denied relevant information about the operations of the school district that is responsible for educating children;

— *every taxpayer*, whose taxes pay for the irresponsible spending of a school district administration that has stifled informed criticism; and

— *every property owner*, whose property taxes may be spent irresponsibly by a school district insulated from knowledgeable criticism.

This Court has held in a related area that, because of the "difficulty of forcing . . . judges to decide, on an *ad hoc* basis, which publications address issues of 'general or public interest,' and which do not," privileged First Amendment speech depends on whether the injured party is a public figure, rather than whether the statements deal with an issue of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). See also *McKinley v. City of Eloy*, 705 F.2d 1110, 113-1114 (9th Cir. 1983) (discussing *Gertz*' "public figure" test in the context of applying *Pickering, supra*, and *Connick, supra.*) This Court has an institutional responsibility to provide clear guidance to the lower courts and to the public in this area of Constitutional law. For that reason, the Court should grant the writ either to clarify, or to modify, the "public concern" standard.

(D) *The "context" element.* The fourth aspect of the lower court's decision that conflicts with *Connick v. Myers* is the court's application of the "context" element of the First Amendment analysis. This is an area in which the nation's courts have had repeated difficulty. See, e.g., the Fifth Circuit's discussion in *McPherson v. Rankin*, 786 F.2d 1233, 1236, *affirmed sub. nom. Rankin v. McPherson*, 483 U.S. 378 (1987) ("Context" is a difficult mixed question of fact and law not easily delegated between the trier of fact and the reviewing court). The opinion below employs the expression

"actual context" to deny First Amendment protection to speech, which on its face touches on matters of public concern, yet on balance (in the eyes of the reviewing court) expresses less public than private concern. The opinion below thus applies the "context" aspect of the public concern question so as to narrow, rather than to broaden, the First Amendment's protection. In doing so, the court misapplied this Court's decision in *Rankin v. McPherson*, (1987) 483 U.S. 378, 392. The lower court erred by using the phrase "actual context", 20 Cal.App.4th at 1062, to make an overall evaluation that, although Mr. Weber's statements on their face raised a matter of public concern, when viewed overall they were a "mere extension" of an individual grievance. Under this Court's decisions in *Connick*, however, the First Amendment interests should prevail unless the employee's speech involves matters "*only*" of personal interest. *Connick v. Myers*, 461 U.S. 138, 147 (1983) (emphasis added).

The lower court's analysis of this issue opens up a Pandora's box of litigation, using the "actual context" concept to divide the universe into "individual grievances" and "matters of public concern" by apparent inquiry into the public employee's subjective mental state in making her statement to the press. Such a rule of law would encourage public employers to litigate the open-ended "context" issue to death, thus imposing a chilling effect on employees through the uncertainty thus created. As a result, the public would be denied information on the operation of its government.

The better view is that a subjective inquiry into a public employee's state of mind in responding to a newspaper reporter's request is irrelevant to the First Amendment analysis. The proper way to distinguish between an unprotected "mere extension" of an interoffice grievance and a protected statement on a matter of public concern is

whether, objectively viewed, the information could bear on a matter upon which the public must act. If so, the statement touches on a matter of public concern under the First Amendment. See *Thornhill v. Alabama*, 310 U.S. 88, 95-96, 101-102 (1940). If speech, on its face, substantially touches on the matter of public concern, then a broadened inquiry into the context of the speech should not negate that public concern.

Considerations of public policy demonstrate why the "public concern" determination must be made with a view to the general subject matter discussed. If the rule of law were otherwise, then when a newspaper reporter puts a "spin" on an interview that creates the appearance of an individual employee grievance, there would be no First Amendment protection. That approach would ill serve the public interest, as sources of information dry up because public employees are afraid to speak for fear of losing their jobs. *Pickering v. Board of Education*, 391 U.S. 563, 573, 574 (1968) (threat of dismissal is a potent means of inhibiting public employee's speech).

The present record amply reflects that concern. See Mr. Weber's letter to Mr. Streshly dated November 6, 1989 [CT 175-176], discussing the difference between his October 1989 interview and the ensuing article, Appendix 6. (Pursuant to Supreme Court Rule 14.1.(k)(v), the letter of November 6, 1989 is appended to this petition at A-7.) Demonstrably, Mr. Weber's expressed concerns about the district's welfare were not mere extensions of a personal grievance.

For the same reason, the decision below conflicts with this Court's decision in *Pickering v. Board of Education*. Compare 391 U.S. at 566, 569, 571. Under *Pickering*, (a) a superintendant's attempt to prevent criticism by school employees that is directed to the public, (b) a superintendant informing (or preventing the informing of) the

district's taxpayers of the school's financial issues, and (c) a district administration's manner of operating the school system — are *all* matters of public concern protected under the First Amendment. Mr. Weber's statements to the press about the operations of the San Ramon Valley School District are comparable to Mr. Pickering's and equally touch upon matters of public concern.

2. THE DECISION BELOW CREATES AN INTRA-CALIFORNIA CONFLICT WITH THE DECISIONS OF THE NINTH CIRCUIT

With respect to the "context" aspect of the public concern analysis, the decision below conflicts with Ninth Circuit precedent in *McKinley v. Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (when speech substantially touches upon a matter of public concern on its face, a broadened inquiry into context cannot negate that public concern). The decision below further conflicts with the Ninth Circuit's decision in *Allan v. Scribner*, 812 F.2d 426, 431 (9th Cir. 1987) (a personal grievance aspect of a public employee's speech does not negate the First Amendment's protection). Again, the decision below conflicts with the Ninth Circuit's decision in *Roth v. Veteran's Administration*, 856 F.2d 1401, 1405 (9th Cir. 1988) ("misuse of public funds, wastefulness and inefficiency in managing and operating government entities" are matters of public concern under the First Amendment). Similarly, in *Thomas v. Carpenter*, 881 F.2d 828, 830 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028, the Ninth Circuit held that an employee's speech reflecting on a public employer's competence to run a public agency is a matter of public concern , citing *McKinley v. Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983).

Thus, under Ninth Circuit precedent, Mr. Weber's October 1989 press interview raised First Amendment concerns. The decision below thus creates a substantive conflict in the

law applicable to California public employers and employees.

This point was squarely presented to the Court of Appeal. See Mr. Weber's Opening Brief, filed March 4, 1993 at 27:17-24 and at 29:3-18. This conflict is intolerable, because the Civil Rights Act provides concurrent jurisdiction in either state or federal court. 28 U.S.C. § 1343(a)(3); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). The lower court's decision thus raises the specter of forum shopping for the worst possible reason: *differing standards of substantive applicable law between the state and federal courts of the forum state.* This Court should rectify that conflict for the benefit of the residents of California.

3. THE DECISION BELOW REFLECTS A CONFLICT AMONG THE DECISIONS OF THE FEDERAL CIRCUIT COURTS AND ITSELF CONFLICTS WITH DECISION OF THE THIRD, FIFTH, SIXTH, SEVENTH AND TENTH CIRCUITS

The decision below cites *Murray v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984) in apparent support of the proposition that discussions of misuse of public funds and government efficiency are not matters of public concern under the First Amendment. *Murray v. Gardner, supra*, at 438, cited in 20 Cal.App. 4th at 1063. Although the decision below also cites Ninth Circuit case law in this regard, it does not account for Ninth Circuit authority that conflicts with *Murray v. Gardner* on this point. Thus, in *Roth v. Veteran's Administration*, 856 F.2d 1401, 1406 (9th Cir. 1988), the Ninth Circuit held that "wasted resources" and the "efficient and ethical operation" of a government agency are "inherently of interest to the public." The decision below holds squarely to the contrary. Thus, the intra-California conflict between the decision below and Ninth Circuit case

law is reflective of a conflict among the federal circuit courts. This again underscores the need for this Court to speak authoritatively on this Constitutional issue of first magnitude.

In addition to creating an intra-California conflict between decisions of state and federal courts, the decision below conflicts with decisions of the Third, Fifth, Sixth, Seventh, and Tenth Circuits.

(A) In *Wulf v. City of Wichita*, 883 F.2d 842, 860 (10th Cir. 1989), the Tenth Circuit held that only a portion of the communication at issue need address a matter of public concern, in order to implicate the First Amendment's protection. The Fifth Circuit held likewise in *Brawner v. City of Richardson, Texas*, 855 F.2d 187, 192 (5th Cir. 1988). Conversely, the decision below vitiates the free speech interest on the ground that Mr. Weber's newspaper interview expressed both personal and public concerns.

(B) In *Biggs v. Dupo*, 892 F.2d 1298 (7th Cir. 1990), the Seventh Circuit held that a police officer's First Amendment rights were violated when he was fired for making statements, printed in a newspaper article, that were critical of local police and government officials. In his newspaper interview, the plaintiff officer complained that his personal application for promotion had been turned down. Nevertheless, the interview did not become unprotected simply because it included a complaint personal to the officer. Instead, the Seventh Circuit recognized that an individual's expression of his personal disappointment can illustrate generally how political interference is hurting the local police force. *Id.*, at 1302-1303.

Conversely, the opinion below fails to recognize the public's First Amendment interest in Mr. Weber's expression of his personal disappointment with school district administration, as illustrative of a more general concern. In the present

case, the public of the school district was entitled to know that the district superintendant was willing to endanger the success of the district's long-term school building program in order to rid himself of the manager who had previously blown the whistle on the superintendant's budget improprieties.

(C) The decision below also conflicts with the Third Circuit's decision in *O'Donnell v. Yanchulis*, 875 F.2d 1059 (1989). In *O'Donnell*, town supervisors asked the police chief and his subordinates to "fix" certain traffic citations. When the chief refused, he was threatened with firing. When the chief then informed a local television station of the supervisor's demands, the supervisors fired him. *Id.* at 1060.

The Third Circuit held the firing to be unconstitutional, observing that the public has a significant interest in encouraging legitimate whistleblowing so that it may receive and evaluate information concerning the alleged abuses of public officials. The court noted that this interest is particularly acute where the information of illicit activities might not otherwise be available to the public. *Id.* at 1061.

Here, the lower court erred by failing to account for the public's interest in hearing what Mr. Weber had to say about the operations of the school district.

(D) Similarly, the decision below conflicts with the Third Circuit's earlier decision in *Zamboni v. Stamler*, 847 F.2d 73 (1988). In *Zamboni*, a county investigative officer was disciplined for criticizing the county prosecutor's reorganization plan for the office, which affected the investigative officer personally. Unlike the decision below, the Third Circuit's decision recognizes that a public employee's criticism of the internal operations of her place of public employment is a matter of public concern. Even though the investigative officer had a personal stake in the speech at

issue, that factor was not controlling in assessing the character of the speech. *Id.* at 77-78. Conversely, the decision below held that Mr. Weber's perceived personal motivation was the determining factor, labelling that overall evaluation as the "actual context" of Mr. Weber's statements. 20 Cal.App.4th at 1062. However, as the *Zamboni* court noted:

> "[I]t is unlikely that an employee who lacks a personal interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her First Amendment rights."
>
> *Zamboni v. Stamler*, 847 F.2d at 78.

(E) The decision below conflicts with the Fifth Circuit's decision in *Brawner v. Richardson*, 855 F.2d 187 (1988) with respect to the "context" aspect of the "public concern" question. *Brawner* involved an anonymous letter critical of a local official, with copies to the police chief, the mayor, city council members, and reporters of local newspapers. The plaintiff officer was fired as the source of the critical allegations in the anonymous letter, including allegations of police misconduct. *Id.* at 189-190. In finding the letter protected by the First Amendment, the Fifth Circuit stressed that the statements in the letter had to be seen in the "context" of the continuing commentary that had originated in the public forum of a newspaper: the disclosure of misbehavior by public officials is a matter of public interest deserving constitutional protection. *Id.* at 191.

Here, consistent with *Brawner*, the California Court of Appeal should have viewed Mr. Weber's October newspaper article in the "context" of the earlier June headlines (A-5) identifying Mr. Weber as a whistleblower with respect to the superintendant's budget improprieties. Instead, the opinion below uses the phrase, "actual context," as a conclusion for an overall evaluation that speech expressing both public and

personal concerns ought not be protected by the First Amendment.

(F) For the same reason, the opinion below conflicts with the Third Circuit's decision in *Rode v. Dellarciprete*, 845 F.2d 1195 (1988), *appeal after remand on other grounds*, 892 F.2d 1177. There, the Third Circuit reviewed the discipline of a state police department employee who had suffered on-the-job retaliation for her brother-in-law's testimony under subpoena in a civil rights lawsuit against the police. The Third Circuit held that retaliation by the police under these circumstances was a matter of serious public concern, notwithstanding that the source of the criticism expressed the issue in terms of her personal employment. Compare the personal nature of the complaint in *Rode* to Mr. Weber's statement as reported in the October, 1989 article (A-6). Applying the decision below to *Rode*, the plaintiff's discipline would have been upheld, because the "actual context" would have been deemed a personal complaint. Thus, the decision below cannot be squared with that of the Third Circuit.

(G) The California Court of Appeal's decision also conflicts with the Sixth Circuit's decision in *Matulin v. Lodi*, 862 F.2d 609 (1988). In *Matulin*, a police officer responded to a newspaper reporter's inquiries regarding her pending discrimination claims against her public employer. Notwithstanding the personal nature of the discrimination claim, the Sixth Circuit held that the employee's statements touched on a matter of public concern under the First Amendment. The Court observed that when a public employee participates in an interview sought by a newsreporter on a matter of public concern, the employee is engaged in the exercise of a First Amendment right to freedom of speech, even though the employee might have a personal stake in the substance of the interview. *Id.* at 612-613. The decision below conflicts with *Matulin* by failing to recognize that Mr. Weber's

statements to the press also address issues of the highest public concern — the future of the public schools — notwithstanding an element of personal grievance in the employee's communication.

THE PRESENT PETITION MAY BE AFFECTED BY THE COURT'S DECISION IN *WATERS v. CHURCHILL*, PRESENTLY PENDING BEFORE THE COURT

In *Waters v. Churchill*, Case No. 92-1450, this Court granted petition for certiorari on June 21, 1993, with respect to the state of mind required of the defendant public employer to prove a First Amendment violation for retaliation against an employee who had spoken on a matter of public concern.

Oral argument was held in *Waters* in December, 1993. It is possible that *Waters* will be decided on procedural grounds under Federal Rule of Civil Procedure 56. In that case, the First Amendment question may remain unresolved. In addition, *Waters* does not directly raise the question here: what is a matter of public concern under the First Amendment, and how should the lower courts go about making that determination?

As a result of this Court's decision in *Waters*, the importance of the question presented by that petition may be increased, or a direct conflict of decisional law may be created, or the need for review of the lower court's decision may be rendered moot. For this reason, petitioner alerts the Court that it may wish to defer action on the present Petition pending the Court's ruling in *Waters v. Churchill.*

IN THE ALTERNATIVE, THE DECISION BELOW SHOULD BE SUMMARILY REVERSED

As an alternative remedy, petitioner requests that the Court exercise its power of summary reversal of the lower court's decision. The decision below badly misapplies this

Court's First Amendment decisions in *Pickering v. Board of Education, supra, Connick v. Myers, supra*, and *Rankin v. McPherson, supra.* As noted above, the First Amendment free speech issue presented here may be affected by this Court's decision in *Waters v. Churchill.* Following the Court's decision, if this Court elects not to address the issues presented in this writ petition at the present time, petitioner requests that the court issue the writ, vacate the ruling below, and remand the matter to the lower court for redetermination in light of *Waters v. Churchill.*

Petitioner respectfully submits that, without regard to the outcome of the *Waters* case, the present case is an appropriate one for certiorari. Unlike *Waters*, the present case addresses the issue of the First Amendment status of a public employee's speech that is purposefully directed to the general public, in this case, to a newspaper reporter; conversely, *Waters* involved only communication within the workplace itself. And, as noted above, the central First Amendment issues are different: *Waters* raises the issue of the employer's requisite state of mind, whereas *Weber* addresses the "public concern" issue.

CONCLUSION

The issue of what is a matter of public concern, for purposes of a public employee's First Amendment rights of free speech, has been a source of continuing controversy and litigation in both state and federal courts. In the present case, all relevant factors suggest that this Court should exercise its certiorari jurisdiction. The type of issue - a public employee's right of free speech regarding matters of public concern under the First Amendment — is one that it is especially appropriate for Supreme Court determination. The way in which the issue was decided below — against the public employee's freedom of speech and against the public's right to know — underscores the need for this Court

to act. Moreover, the confused state of the law calls out for definitive guidance now. The lower court's decision is in direct and irreconcilable conflict with this Court's First Amendment decisions in *Pickering, Connick* and *Rankin.* Finally, the nature and number of people affected support exercise of certiorari jurisdiction: those affected include not only all public employees of the nation's largest state, but also the general voting public as well, who rely on public employees for information that makes the right to vote a meaningful one.

Under a regime governed by the California District Court of Appeal's decision, the public will only learn of financial mismanagement in the way that the unfortunate parents and taxpayers of the neighboring Richmond, California school district did so: through publication of the school district's bankruptcy petition. At that point, it was too late for Richmond to avert disaster through the self-corrective mechanism of electoral politics, where an informed citizenry can take action in the voting booth by choosing a new school board. The ultimate losers were the school children of the district.

As the recent book "Reinventing Government" and the Vice-President's Task Force Report on Government both indicate, budget constraints dictate that all levels of government will experience "downsizing" in the next several years, analogous to what private industry experienced during the 1980s. With the losses of many thousands of jobs, government entities, like the present School District, will have many opportunities to retaliate against outspoken employees like Mr. Weber, and both state and federal courts will face many cases in which a terminated public employee raises the First Amendment issue presented here. As a matter of the Court's institutional role in administering the lower courts, the present moment is a propitious time for the Court to resolve the conflict in the published decisions by

providing direction as to the scope of a public employee's right to speak publicly on matters of public concern.

There is no area of civil law in which the public more expects leadership from the Supreme Court than the area of Constitutional protection of free speech on matters of public concern. Our political order, and its search for a system of government that is both democratic and free, gives extraordinary power to the judiciary. From the Constitution's inception, political thinkers and legal scholars have questioned, and have attempted to reconcile, the institution of an independent judiciary as a co-equal branch of government, unelected and largely immune from direct control by the people or their representatives, with the American ideal of electoral democracy. Our Constitutional tradition provides two answers to that question: first, that no society is legitimately democratic unless it accepts some limitation on democratic power in the interest of individual liberty. Those liberties will only endure if they are enforced. "[T]here is no liberty if the power of judging be not separated from the legislative and executive powers." Montesquieu, *Spirit of Laws*, page 181, quoted in Hamilton, *Federalist* 78, page 466 (C. Rossiter edition, 1961). Here, Mr. Weber petitions for review in order to secure that liberty.

Secondly, essentially undemocratic courts are necessary to maintain the integrity of more directly democratic institutions, such as by protecting civil and voting rights. By doing so, the courts operate in our society, "as far as republican principles admit" (*Federalist* 77, page 463), to supply to democracy the competences and restraints that democracy itself acknowledges to be necessary, such as when the right to vote is threatened or when the right to speak on matters of public concern is endangered. It is an essential Constitutional function of this Court to exercise its judicial power when individual liberties are threatened and when the integrity of democratic institutions are imperiled.

This case presents both issues: the School District's retaliation against Mr. Weber for his statements on matters of public concern violated not only Mr. Weber's individual liberty, but also threatened the public's interest in information material to the voters in school district elections. *Thornhill v. Alabama*, (1940) 310 U.S. 88, 95-96, 101-102. For that reason, a writ of certiorari should issue to review the decision of the California District Court of Appeal in this matter.

Respectfully submitted,

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Appendix 1

San Ramon Valley Unified School District
20 Cal.App.4th 1054; — Cal.Rptr.2d — [Dec. 1993]

VERN WEBER,
Plaintiff and Appellant,

v.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT et al.,
Defendants and Appellants.

SUMMARY

In an action for legal and equitable relief based on the termination of plaintiff's employment as a senior manager of a school district, alleging deprivation of civil rights under 42 U.S.C. § 1983 and wrongful termination under Ed. Code § 45117 and 45308, the trial court awarded plianitff compensatory and punitive damages and attorney fees. Plaintiff had been terminated after making certain statements to the press. (Superior Court of Contra Costa County, No. C-90 03341, Jay A. Pfotenhauer, Judge.)

The Court of Appeal reversed the order awarding attorney fees, but affirmed the judgment in all other respects. The court held that the school district's elimination of plaintiff's position for lack of work or funds was merely a pretext, and that although it was error to rule that plaintiff's statements to the press were constitutionally protected, since the statements concerning the circumstances of plaintiff's departure from the school district related only to his individual employee grievance, there was no reasonable probability that this error affected the jury's verdict on the action brought under the Education Code. Under Cal. Const., art. VI, § 13 (test of prejudicial error), a miscarriage of justice should be declared only if it is reasonably probable that a result more

favorable to the appealing party would have been reached in the absence of the error. However, the award of attorney fees under 42 U.S.C. § 1988(b) (fees in actions to enforce 42 U.S.C. § 1983) had to be reversed, since plaintiff would not have prevailed in his action under 42 U.S.C. § 1983 were it not for the erroneous ruling on constitutionally protected speech. (Opinion by Newsom, J., with Strankman, P.J., and Stein, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 55 — first amendment and other fundamental rights of citizens — Freedom of Speech and Expression — Termination of Public Employment for Speech: Public Officers and Employees § 30 — removal from office — Freedom of Speech. — A public employee's exercise of the right to speak on issues of public importance may not furnish the basis for dismissal. Courts should balance the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs. The threshold question of whether the speech was on a matter of public concern is a question of law that may be reviewed de novo on appeal, and must be determined by the content, form, and context of a given statement. Only speech relating to matters of public concern, and not speech voicing grievances about internal office affairs, can give rise to a cause of action under 42 U.S.C. § 1983 for deprivation of civil rights.

(2) Schools § 48 — Teachers and Other Employees — Suspension or Dismissal — Judicial Review — Dismissal as Violating Constitutional Rights: Appellate Review § 184 — Harmless and Reversible Error — Findings of Fact and Conclusions of Law — Constitutionally Protected Speech. — In an action by a senior manager of a school district

brought pursuant to 42 U.S.C. § 1983 (deprivation of civil rights), and Ed. Code, §§ 45117 and 45308 (wrongful termination), the manager was entitled to compensatory and punitive damages under his Education Code claims, where the elimination of his position for lack of work or funds was merely a pretext. Although it was error to rule that the manager's statements to the press were constitutionally protected, where the speech in question related only to an individual employee grievance, there was no reasonable probability that this error affected the jury's verdict on the action brought under the Education Code. Under Cal. Const. art. VI, § 13 (test of prejudicial error), a miscarriage of justice should be declared only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. However, the award of attorney fees under 42 U.S.C. § 1988(b) (fees in actions to enforce 42 U.S.C. § 1983) had to be reversed, since plaintiff would not have prevailed in his action under 42 U.S.C. § 1983 were it not for the erroneous ruling on constitutionally protected speech.

[See 8 *Witkin*, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 708; 9 *Witkin*, Cal. Procedure (3d ed. 1985) Appeal, § 324.]

COUNSEL

Faust & Roy and Geoffrey M. Faust for Plaintiff and Appellant.
Liebman, Reiner & McNeil and Joseph R. Zamora for Defendants and Appellants.

OPINION

NEWSON, J. — San Ramon Valley Unified School District (School District), William A. Streshly and James C. O'Connor appeal a judgment in favor of Vern Weber (hereafter Weber) awarding $313,600 in economic damages and

$75,000 for mental and emotional distress. William Streshly also appeals the portion of the judgment awarding Weber $7,500 in punitive damages against him. Both parties have filed notices of appeal from a decision awarding attorney fees in the amount of $177,034.50.

In an original complaint filed July 31, 1990, and a first amended complaint filed nine months later, Weber alleged fifteen causes of action for legal and equitable relief based on the termination of his employment with the School District. The case was, however, submitted to the jury on only two causes of action as a result of orders of summary adjudication and voluntary dismissal. In response to two motions for summary adjudication the trial court dismissed a series of causes of action based on theories of fraud, breach of contract, and punitive damages. At the close of evidence, Weber voluntarily dismissed remaining causes of action for negligent misrepresentation and fraud in the face of a motion for nonsuit. The case was submitted to the jury of two theories: wrongful termination under Education Code sections 45117 and 45308 and violation of civil rights under 42 United States Code section 1983.

The jury returned a special verdict finding the School District liable on both theories. Addressing the alleged violation of the Education Code, the jury answered "yes" to the question: "Was Plaintiff laid off for reasons other than lack of work or lack of funds?" And "no" to the question: "If your answer to Question 1 is 'Yes', would the School District nevertheless have laid off Plaintiff because of lack of work or lack of funds?" Since the School District never contended that Weber was laid off for cause or poor job performance, the findings compelled the conclusion that he was terminated in violation of the Education Code sections 45117 and 45308. With regard to the claimed violation of civil rights, the jury answers "yes" to the question: "Was the defendants' decision to lay off the plaintiff substantially

motivated by plaintiff's statements on matters of public concern?" And "no" to the question: "Would the defendants have reached the decision to lay off the plaintiff even if he had not made statements on matters of public concern?"

The facts may be very briefly stated because the disposition of the appeal turns on a narrow issue: whether the First Amendment protects Weber's statement to the press published October 24, 1989. As one of five senior managers of the School District, Weber was a classified employee under the Education Code working on independent contract. He had begun work for the School District in 1973 as a business manager after working some time as an educational consultant. In 1984, his job description was changed to director of management services. His responsibilities included demographic planning, facilities planning, and liaison with the Office of Local Assistance, the agency of the State Department of Education providing funding for local school districts. In 1989, he enjoyed a salary of $75,000 plus benefits. By all accounts, Weber was an outstanding employee with a state-wide reputation in the fields of demographics and facilities planning.

In 1986, appellant William Streshly was appointed superintendant of the School District. He soon began to form his own management team, prompting two senior managers to leave district positions. Weber's own contract expired in June 1989, although he would continue to enjoy job protection as a classified employee. By the time he faced the prospect of renegotiating his contract, Weber had fallen into conflict with Streshly on certain issues. Weber resisted Streshly's use of money from a fund derived from developer's fees for purposes which were not closely related to capital expenditures for new school facilities. In addition, late in 1988, Streshly inflated Weber's projection for student enrollment so as to produce the appearance of a balanced budget in the next school year. In two confidential memo-

randa written late in the year to School District management, Weber predicted that the inflated projection would lead to a substantial deficit for the next school year.

On April 10, 1989, James O'Conor assumed the duties of assistant superintendant — filling a vacancy for which Weber had applied. The superintendant, Streshly, advised him that he would be expected to reorganize the business functions of the School District, including Weber's position. On his second day on the job, O'Connor interviewed Weber concerning four areas of perceived weakness in his job performance. At trial, O'Connor acknowledged that he relied on Streshly for his information about these alleged shortcomings. In May, O'Connor talked to Weber about the option of applying for a newly created position offering a substantially lower salary. He told Weber that the District needed his skills in demographics and facilities planning but desired these services at a lower cost. About this time, O'Connor testified that he began talking to Weber about the possibility that Weber could continue to work for the School District on a parttime basis as a consultant. Other top officials testified that, as the expiration date of Weber's contract approached, they discussed in a "cabinet" meeting of top officials the desirability of eliminating Weber's position while retaining his invaluable expertise as a consultant.

For his part, Weber points out that he was on a list of management employees for the next year which the school board approved on June 20, 1989. He claims that the administration first asked him to resign on June 28, 1989, the day after he was interviewed by a local newspaper reporter. Late in the afternoon of that day, Weber was summoned into Streshly's office to answer questions of Kay Hwangbo, a reporter for the San Ramon Valley Times. Hwangbo was questioning Streshly about the inflation of student enrollment fugures for the 1988-89 school year. Although Streshly acknowledged he had deliberately in-

flated the staff estimate, Hwangbo wanted to pursue the point. Streshly testified it was his normal practice to transfer a reporter to staff members with specific expertise in the topic under discussion. Weber himself was frequently quoted in the press.

When Weber entered the room he found Streshly talking to the reporter on a speaker phone. Streshly told Weber to "give her what she needed" and suggested that he could pick up the receiver for a one-on-one conversation. Weber talked to Hwangbo for about five minutes on the topic of the inflated student enrollment figures as Streshly and O'Connor stood in another part of the room. He did not know whether they overheard the conversation. Streshly never commented on the way Weber conducted the interview.

The next afternoon, O'Connor asked Weber to resign his position and take a consulting role with the School District. Weber replied that he "would be willing to discuss that" if he were offered "the right terms and conditions. . . ." On June 30, 1989, Hwangbo's article appeared in the San Ramon Valley Times, portraying Weber as a whistle-blower. The headline stated in bold letters "Streshly Cited for Deficit" and continued in lower type: "Facilities director says funds were inflated." The same day O'Connor visited Weber's office and demanded again that he resign. Since Streshly was then out of town, the two men scheduled a meeting for July 6, 1989, after his return.

On July 6, 1989, Weber met for about one and one-half hours with Streshly, O'Connor, and Mike Halloran, the assistant superintendant for personnel. At the conclusion of the meeting, O'Connor briefly summarized on a hand-written note the agreed terms for Weber's resignation: (1) he would remain on the payroll until December 31, 1989, taking 2 months of accrued vacation in November and December; (2) effective January 1, 1990, he would be given

a consulting contract calling for 1,000 hours of work at a rate of $50 per hour; (3) the School District would provide health and welfare benefits until age 70; and (4) the parties would agree on a joint statement regarding his resignation.

The School District attorney, Sandra Wolliver, prepared a draft of the consulting agreement, but Weber strongly objected to a provision saying that "neither party may make any other public statement," apart from the joint statement regarding Weber's retirement from the district, and he insisted on a draft of the agreement that he had written himself without this provision. In September, Streshly and Weber signed an agreed public statement. On October 16, 1989, Streshly signed a formal consulting agreement, promising Weber two years of employment as a consultant on the agreed terms. Weber signed the agreement the next day.

Upon learning of his resignation, Hwangbo interviewed Weber for 20 to 30 minutes by telephone. She testified that he told her "that he was being forced to leave the School District," that he had been asked to sign a document prohibiting him from talking "about his leaving the School District or anything like that," that he was never told "why he was being let go," and that "he was concerned about what would happen with the facilities department . . . [because] there was nobody in the School District that had his particular expertise in that area." An article sympathetic to Weber containing the substance of the interview, was published on October 24, 1989, under the headline "Weber says he was forced from district job." He was quoted in bold print as saying that he had "serious concerns for the welfare of the school district."

On November 1, 1989, Streshly wrote Weber a letter claiming that they had "not yet reached a final agreement regarding [his] separation from the district." Streshly stated, "Several issues which have surfaced, we must discuss them immediately." Among these issues was [Weber's]

recent unilateral statement to the press regarding separation from the district which directly contradicts [his] proposed joint statement." A few days later, Weber received another letter from Streshly stating that the School Board had eliminated his job for "lack of work and/or lack of funds." Retaining an attorney, Weber sought unsuccessfully to renegotiate the consulting agreement. Among other things, the School District objected that the provision regarding a joint statement was "no longer performable" because of his "unilateral public statement about his employment and retirement. . . ." The School District eventually retained another consultant to do the work promised to him. At trial, O'Connor characterized Weber as "a victim" of the October 24, 1989 article.

In the orders granting summary adjudication, which are not challenged in this appeal, this trial court ruled that the consulting agreement signed by Streshly, not having been properly authorized, was therefore unenforceable under the Education Code and that the alleged misrepresentations leading to Weber's resignation were not actionable under Government Code sections 818.8 and 822.2. Nevertheless, the court admitted evidence of the October 24, 1989, article for its relevance to the cause of action for deprivation of civil rights which is premised on the theory that Weber was discharged as retaliation for his exercise of his First Amendment rights. Ruling on a motion *in limine*, the court found that the statement was constitutionally protected. In this appeal, the School District bases its attack on the judgment for damages solely on this constitutional ruling.

Weber brings his cause of action for deprivation of civil rights under 42 United States Code section 1983, invoking the concurrent jurisdiction of state courts in the enforcement of this federal statute. Subject to a qualified immunity which we do not reach here (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L.Ed.2d 396, 410-411, 102 S.Ct.

2727]), the statute creates a cause of action for damages against any state official "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . " the same constitutional standards apply in suits brought against state officials under section 1983 and in suits brought directly under the constitution against federal officials. (*Butz v. Economou* (1978) 438 U.S. 478, 504 [57 L.Ed.2d 895, 914, 98 S.Ct. 2894].)

(1) Since the United States Supreme Court decision in *Pickering v. Board of Education* (1968) 391 U.S. 563, 574 [20 L.Ed.2d 811, 821, 88 S.Ct. 1731], it has been well established that a public employee's exercise of his "'right to speak on issues of public importance'" may not furnish the basis for his dismissal from public employment. (*Havekost v. U.S. Dept. of Navy* (9th Cir. 1991) 925 F.2d 316, 318; see also *Burgess v. Pierce County* (9th Cir. 1990) 918 F.2d; *Barnes v. Small* (D.C. Cir. 1988) 840 F.2d 972, 982 [268 U.S.App.D.C. 265].) The *Pickering* decision directs the courts to balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services, it performs through its employees." (*Pickering v. Board of Education, supra*, 391 U.S. 563, 568 [20 L.Ed.2d 811, 817].) But "the threshold question before applying the balancing test is whether the employee's challenged speech may be 'fairly characterized as constituting speech on a matter of public concern. . . .' " (*Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 643 [283 Cal.Rptr. 610]; *Rankin v. McPherson* (1987) 483 U.S. 378, 384 [97 L.Ed.2d 315, 324, 107 S.2891].) This question of whether "an employee's speech involves a matter of public concern is a question of law" (*Roth v. Veteran's Admin. of Government of U.S.* (9th

Cir. 1988) 856 F.2d 1401, 1405) which may be reviewed de novo on appeal. (*Allen v. Scribner* (9th Cir. 1987) 812 F.2d 426, 430, fn. 8.)

"Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal," the *Pickering* decision did not "attempt to lay down a general standard against which all such statements may be judged" but merely indicated "some of the general lines along which an analysis of the controlling interests should run." (*Pickering v. Board of Education, supra*, 391 U.S. at p. 569 [20 L.Ed.2d at pp. 817-818].) " 'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.' " (*Rankin v. McPherson, supra*, 483 U.S. 378, 3844-3385 [97 L.Ed.2d 315, 324-325].) Pursuing this analysis, the Supreme Court in *Connick v. Myers*, (1983) 461 U.S. 138 [75 L.Ed.2d 708, 103 S.Ct. 1684], distinguishes between speech related to matters of public concern — the focus of the *Pickering* decision — and speech voicing grievances about internal office affairs. Only the former, it held, can give rise to a cause of action under section 1983.

The plaintiff in *Connick*, an assistant district attorney who was transferred to another division of the criminal court, distributed a questionnaire to other assistance district attorneys concerning, among other things, "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, . . ." (461 U.S. at p. 141 [75 L.Ed.2d at p. 716].) This action resulted in her immediate dismissal from her job. The Supreme Court viewed the questions propounded in the questionnaire as "mere extensions of [her] dispute over her transfer to another section of the criminal court." (*Id.* at p. 148 [75 L.Ed.2d at pp. 720-721].) While this dispute was not "totally beyond the

protection of the First Amendment," it did not present a constitutional issue that could be scrutinized by federal courts in action under 42 United States Code section 1983. The court held ". . . that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." (461 U.S. at p. 147 [75 L.Ed.2d at p. 720].)

The court sought to avoid an interpretation of 42 United States Code section 1983 that would "constitutionalize" ordinary employee grievances, adding a federal cause of action to the remedies otherwise existing under state law. The issue is not whether the grievance was well founded; other provisions of law may provide a remedy if the employee's contractual or statutory rights were violated. The narrow issue presented by section 1983 is whether the employee's discharge is barred by the First and Fourteenth Amendments. The constitutional standard, protected by section 1983, bars discharge only when the employer retaliates against the exercise of speech on "public issues," which occupies "the highest rung of the hierarchy of First Amendment values" and is entitled to special protection." (461 U.S. at p. 145 [75 L.Ed.2d at pp. 718-719].) In contrast, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." (*Id.* at p. 146 [75 L.Ed.2d at p. 719].)

(2) While ruling that the October 24, 1989, statement was constitutionally protected, the trial court commented that it presented a "borderline situation." We agree that the

issue is close, but conclude that the statement does not fall into the category of statements protected by section 1983. Weber's statements concerning the circumstances of his departure from the school district clearly relate to an individual employee grievance, i.e., that he was forced out of the position without an explanation and asked to sign a "gag" document preventing public comment. The more difficult question relates to his expressed concern for the welfare of the school district. On its face, this statement might seem to involve a matter of public concern. But in actual context, Weber's concern for the district welfare was a "mere extension" of his individual grievance. His concern was directed at the consequence of his discharge on the management of district affairs; the detriment to district welfare lay in the loss of his own expertise. The expressed concern did not go beyond the subject of his own individual grievance — the loss of his job — and therefore did not concern a matter of public concern as defined in the *Connick* decision. (See *Allen v. Scribner, supra*, F.2d 426, 4312; *Murray v. Gardner* (D.C. Cir. 1984) 741 F.2d 434, 438 [239 U.S.App.D.C. 212]; *McKinley v. City of Eloy* (9th Cir. 1983) 705 F.2d 1110, 1114; *Chico Police Officers' Assn. v. City of Chico, supra*, 232 Cal.App.3d 635, 644.)

We now address the perplexing question of the implications of the error for disposition of the case on appeal. Under California Constitution, article VI, section 13, the test of prejudicial error "may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

Under this standard, we do not see any reasonable probability that the error affected the jury's verdict on the

action brought under the Education Code. The evidence had no logical connection with the issues presented by this legal theory, and Weber's case was very strong. An abundance of evidence tended to prove that the School District's elimination of Weber's position for "lack of work and/or funds" was merely a pretext adopted after the fact. Without question, he was an exceptionally effective and productive employee. After his discharge, the School District attempted to replace his contribution by delegating tasks to several employees with less than complete success. James O'Connor acknowledged that it took the equivalent of two and one-half employee positions to perform the work that Weber was doing. Although the School District was under financial pressure, Weber's position was funded by a developer's fund, devoted to capital improvements, that was under less financial pressure than the general fund. A series of witnesses testified that lack of work or funds was in fact never mentioned in connection with Weber's discharge.

Similarly, we do not think it reasonably probable that the error affected the award of punitive damages against William Streshly. The claim for punitive damages was based on a lengthy course of conduct, beginning with Weber's opposition to Streshly's policies, that was relevant to both causes of action.

But apart from the October 24, 1989, article, the cause of action for deprivation of civil rights was based on rather tenuous inferences drawn from the succession of events. In testimony strongly disputed by other School District officials, Weber said that he was first given an ultimatum to resign the day after he gave the interview for this article. The testimony was strongly disputed by other School District officials, but it gained plausibility in light of the school district's response to the October 24, 1989 publication, Streshly explicitly raised the October 24, 1989 article as an obstacle to the proposed consulting contract and ultimately

reneged on his promise to secure the contract. While the denial of this proposed arrangement was not actionable, it gave credibility to Weber's claim that Streshly had also sought his resignation because of his earlier disclosure to the press. Weber's counsel linked the two incidents in a compelling argument to the jury: "If October 24th costs Mr. Weber his consulting agreement, it's a little difficult to believe that the June 30th article wouldn't have cost him his job."

We find that, in the absence of the court's erroneous ruling extending constitutional protection to the October 24, 1989 statement, it is reasonably probable that the jury would have reached a result more favorable to the School District on the civil rights cause of action. This conclusion, however, does not affect the judgment for compensatory damages. The theory of deprivation of civil rights was one of two alternative theories of liability supporting the same elements of damages. The error only calls into question the validity of the award of attorney fees.

The court awarded attorney fees under the authority of 42 United States Code section 1988(b) which provides in relevant part: "In any action or proceeding to enforce a provision of sections . . . 1983 . . . [of this] title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The statute has no counterpart in the Education Code.

We are forced to conclude that Weber did not prevail in his action under 42 United States Code section 1983 because, to the extent that it was based on this theory of liability, the judgment is subject to reversal for prejudicial error. We recognize some possible unfairness in this result. Since the facts underlying the June 30, 1989 article (as opposed to that of October 24th) might have supported an inference allowing the case to go to the jury could have upheld this theory of liability in any event. But we cannot

remand the case for a new trial simply in order to determine Weber's right to attorney fees on the first trial; and, as the case reaches us in this appeal, the action under 42 United States Code section 1983 has proved to be inconclusive.

The order awarding jury fees filed December 18, 1991, is reversed. In all other respects the judgment is affirmed. Costs to the School District.

Strankman, P.J., and Stein, J., concurred.

Appendix 2

First Appellate District,
Division One

No. A055893

S037325

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

VERN WEBER,
Appellant

v.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT Et Al.,
Appellants

Appellant's petition for review DENIED.

Kennard, J. is of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Officials Appellate Reports the opinion in the above-entitled appeal filed December 7, 1993, which appears at 20 Cal.App.4th 1054. (Cal. Const., Art. VI, section 14, rule 976, Cal. Rules of Court.)

Lucas
Chief Justice

Appendix 3

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

VERN WEBER,
Plaintiff,

vs.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, WILLIAM A. STRESHLY, JAMES C. O'CONNOR, and DOES 1 through 30,
Defendants.

NO. C90-03341

DECISION RE: ATTORNEY FEES

Plaintiff prevailed against defendants in his Civil Rights action and now seeks an award for reasonable attorney's fees pursuant to 42 U.S.C. 1988.

The motion was timely filed and heard December 3, 1991 and submitted upon the argument of counsel as well as the memoranda, declarations and authorities filed herein, all of which have been read and examined. A post hearing memorandum filed on behalf of plaintiff has also been considered.

This action arose out of plaintiff's employment with defendant San Ramon Unified School District (hereafter designated as "District"), which was had under a written agreement expiring December 31, 1989. The employment covered a number of years and he held the position of Director, Management Services, at an annual salary of $75,000.00. His principal duties were to undertake demographic studies and he testified he ranked among the most qualified engaged in such activity within the school districts

of this state. During the Spring of 1989 he was unsuccessful in his quest for appointment as Assistant Superintendant of the District.

Later in the same year, plaintiff and staff negotiated an agreement to be effective January 1, 1990 for his services as a consultant for a period of two years during which he would provide 1,000 hours of services. This agreement required the acceptance of the District Board.

On October 24, 1989, a local newspaper published an article quoting criticism which plaintiff had expressed with respect to the management and administration of the District. On November 9, 1989, plaintiff was informed the Board had not approved the agreement and terminated his position as of December 31, 1989.

The jury in its Special Verdict found that "the defendants' decision to lay off the plaintiff (was) substantially motivated by plaintiff's statement to the press of public concern."

Damages were awarded against all defendants in the sum of $388,600.00 and an additional award for punitive damages in the amount of $7,500.00 was had against defendant William A. Streshly. This resulted in a total award of $396,100.00.

The plaintiff and his counsel had entered into a 40% contingency fee agreement which amounts to $158,440.00.

In cases of this nature, a contingent fee agreement is not controlling, yet it is a factor to be considered in determining a reasonable fee.

The findings hereafter made take into account the factors to be employed as guidelines in arriving at a reasonable fee as prescribed in *Kerr v. Extras Guild, Inc.* 526 Fed.2d 67.

The complaint, which was filed July 1990, contained fifteen (15) causes of action of which thirteen (13) were

dismissed upon two motions for summary adjudication of issues. Among the issues dismissed, and unrelated to the issues tried before the jury, were causes based on contracts and tortious conduct.

Counsel for defendants properly seeks reduction in plaintiff's fees applicable to counsels' resistance of the two motions. He estimated one-half of the total hours claimed by plaintiff's counsel were devoted to these motions. Lead counsel for plaintiff in his declaration acknowledged "... one of the major expenses of time in this case was in opposing the two separate adjudication motions filed by defendants."

Neither counsel, however, provided the Court with particulars as to the hours applicable to these motions, nor does evidence in any instance provide the hours for a given category of activity of the members of plaintiff's counsel. This made it necessary for the Court to examine in detail the computer records for the nature of the services and the hours associated therewith for each of the six individuals rendering services.

GEOFFREY FAUST

Geoffrey Faust was lead counsel and credits himself with 582.70 hours from which 30 hours (5%) is deducted for time relating to the motions for summary adjudication of issues, resulting in a net of 552.70 hours.

His basic hourly charge during the entire period he represented plaintiff was $190.00. His successful undertaking of the matter entitled him to a lodestar fee of $225.00 per hour which is within the market range for such services. The reasonable fee for his services is $124,357.50.

LISA SMITH

Lisa Smith was an associate counsel and was present at counsel table during most of the trial but she did not

participate in any of the oral proceedings. She had just entered her second year of practice when the action was filed. No declaration is provided with respect to any earlier trial experience. The declaration of lead counsel dated November 7, 1991 (Exhibit D) describes the nature of her services but no evidence is provided therein of her qualifications. Therefore, the benefit derived from her activity with respect to items 3, 4, 7 and 8 of Exhibit D cannot be determined. As for the services dealing with "workers' comp exclusive remedy," "management vs. non-management employees" and research re summary adjudication issues, they do not relate to the issues tried.

Lisa Smith is credited with 307.40 hours, from which 46 hours (15%) is deducted for a net of 261.40 hours.

The basic charge for her services is $110.00 which the Court finds reasonable, but her services do not qualify for a lodestar rate. Accordingly, $28,754.00 is deemed a reasonable award for her services.

JEFFREY KIRSCHENBAUM

Jeffrey Kirschenbaum reports 17.5 hours of legal services at a rate of $110.00 per hour. One entry reporting his services reads, "Revised brief re first amendment issues; attended trial — 9 hours." This covered the sixth day of trial at which four members of the firm representing plaintiff were present. There is no evidence to justify the presence of this individual. Accordingly, his chargeable time is reduced to 8.50 hours, for a reasonable charge of $953.00. His services do not merit a lodestar rate.

RICHARD INSALSCO

Richard Insalsco performed 11.70 hours of legal services at a basic rate of $115 per hour which is reasonable but not entitled to a lodestar rate. The sum awarded for his services is $1,345.50.

DAVID DUNBAR

David Dunbar, a legal assistant, credits himself with 267.90 hours of which 104 hours are attributed to his presence during the trial over a period of ten days. During several of these days he credits himself with 11 to 13 hours which includes not less than 2 hours daily travel time to and from the court. His services included the assembly of exhibits which had been accomplished and marked prior to trial. His presence at the trial amounted to overstaffing and the limited duties assigned to him could have been assumed by Lisa Smith. There were occasions when Lisa Smith was absent from the courtroom, during which time plaintiff occupied her chair, assisting lead counsel with exhibits. The basic hourly charge of $95 for this legal assistant is reasonable. His hours are reduced by 84, leaving a net of 184, resulting in a charge of $17,480.00 for his services. His services do not qualify for a lodestar rate.

KAREN NEUSTEIN

Karen Neustein, a legal assistant, reports 55.50 hours at a basic hourly rate of $75.00. The hours and rate are reasonable and result in a charge of $4,162.50. Her services do not merit a lodestar rate.

WORDPROCESSORS/STENOGRAPHERS

The hours reported for this activity is recorded monthly as a single figure with no particulars of the work product. Allowance for such services is denied as it is an essential function of a law office and should be charged to overhead.

The request of plaintiff's counsel for an enhancement or multiplier of the foregoing charges is denied. Plaintiff's case was not of an exceptional nature to qualify for such. It involved no new or novel issue. Counsel had a sophisticated client, fully informed of all aspects of District administration. The principal issue presented to the jury was whether the published statements of plaintiff reported by the press

substantially motivated termination of his services. There was no issue over the content of the news article.

Plaintiff is awarded reasonable attorneys fees in the sum of $177,034.50.

Counsel for plaintiff to prepare form of Judgment and present same to opposing counsel for his approval as to form.

DATED: December 19, 1991

JAY PFOTENHAUER
Judge of the Superior Court

Appendix 4

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances.

AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. 14. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

AMENDMENT XIV

SECTION I

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

42 U.S.C. SECTION 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix 5

Reprinted from the *San Ramon Valley Times*,
June 30, 1989

"STRESHLY CITED FOR DEFICIT"

Facilities director says funds were overestimated

By Kate Hwangbo
Staff Writer

DANVILLE — The school district is battling a $603,000 deficit this year because Superintendant Bill Streshly intentionally overestimated the amount of money that would be available from the state, the district's top school planner has charged.

Facilities Director Vern Weber said Streshly told him to increase estimates of the student population — on which state funding is based — by 105. On paper, the action added $289,380 to the district budget in August 1988.

But when the students didn't materialize, neither did the additional money. The mistake generated half of the $603,000 deficit the district faces today, Weber charged.

Budget officials will reconsider student population this summer as they plan for 1988-89.

Streshly admitted intentionally overestimating the student population, but said he did it because he felt other sources of state income, such as lottery money, had been underestimated. He said he couldn't increase the lottery figure because he is required to document its basis to the county Office of Education.

But the attendance figure wasn't subject to the same documentation requirements.

As it turns out, Streshly's low estimate of the lottery money did balance his overestimate of student population. When the final figures were totaled, the district received

$402,680 more than it had anticipated from the state lottery, but $330,720 less than expected in student-population-based funds.

The superintendant said the deficit was not caused by overestimating student population, but because Budget Director Tom Reid forgot to put aside money to pay teachers an extra $660,658. Reid probably forgot because the raise was negotiated the previous year, Streshly said.

School board members said they were not concerned by Streshly's decision.

"He's the manager," said Board President Jo Anne Erickson. "He has to manage the way he feels comfortable. . . . One way or another it's a no-win situation." Erickson said when a surplus turned up, teachers would claim they could have gotten a higher salary increase.

Board Member Judy Locker called estimating student population "one of the world's biggest crapshoots anyway. It's an extremely difficult science."

But officials of other districts disagreed with Streshly's methods.

"The man would have to have a crystal ball" to count on lottery money to make up other losses, said Fred Basalto, top financial officer of the Richmond Unified School District. "Unless you have a fund that you're sure of, that's not kosher."

"It's not a legitimate thing to do," said Pat Keegan, top financial officer of the state Department of Public Instruction. "Your (population) estimate, which drives your revenue, should be based on your best view of the world."

"We have really tried to be straight," said Paul Allen, an associate superintendant of the Mt. Diablo Unified School District. "If we get enrollment projections and feel the

projection is high, we might drop it, but we'd never inflate it."

Allen said he could not recall ever inflating the projected enrollment in 29 years with his school district.

"It's more of a gamble than I'd be willing to take," said Antioch Unified School District Superintendant Allan Newall.

However, John Hendrickson, assistant superintendant of business services for the county Office of Education, said Streshly did not appear to have done anything inappropriate because his enrollment projection hike was relatively small.

But he added, "Each revenue assumption should stand on its own merits."

In August 1988, Weber predicted there would be 15,305 students that fall.

After discussions with his assistants, Streshly decided to raise that to 15,410 pupils so the district's revenues would appear to cover its expenses on the budget, Weber said.

The real attendance figure was 15,290, leaving the district 120 students short. At $2,756 per student from the state, the district had budgeted $330,720 more than it received. In 1988-89, enrollment-driven revenue came to $42.5 million, 79 percent of the district's $53.4 million budget.

The superintendant described his decision this way: The state gives the district several kinds of income, including money based on enrollment. Because he sensed the district had underestimated other kinds of state income — such as from the lottery or for specialized programs — Streshly said he increased the estimate of enrollment income to compensate.

Enrollment figures are easier to manipulate, budget director Tom Reid said, because the district doesn't have to

defend them to outside agencies, and because they allow for timely adjustments to the budget.

But Basalto of the Richmond district remained unconvinced.

"It seems to me he should have been more direct and raised his assumption for lottery," he said.

Appendix 6

Reprinted from the *San Ramon Valley Times*,
October 24, 1989

"WEBER SAYS HE WAS FORCED FROM DISTRICT JOB"

SRV's management services director to leave post at end of month

by Kate Hwangbo
Staff Writer

DANVILLE — Management services director Vern Weber said Monday that he was forced from his job with the San Ramon Valley school district. The district announced last week that Weber will leave at the end of the month.

Weber said Assistant Superintendant Jim O'Connor asked for his resignation soon after Weber publicly accused Superintendant Bill Streshly in June of inflating expected state revenue to balance the district's budget.

Weber, who will continue as a district consultant, said no one ever told him why he was being let go. He said he was asked to sign a gag document agreeing not to talk about the conditions of his release, which he refused to do.

O'Connor denied that he asked Weber to resign, or that he asked him to sign a gag order. He said he told Weber in May about a staff reorganization and gave him three options. O'Connor and Streshly said those options were to apply for a job that Weber wasn't assured of, take another job that entailed a pay cut or become a consultant. O'Connor said Weber chose the third.

"I have serious concerns for the welfare of the school district," said Weber. "With my leaving there is no one in management that has my expertise" in school planning.

"We're not going to let anything happen to the facilities department," said Streshly. "I think we have the expertise. Those are not highly specialized areas." School building director Don Orr began work in August after leaving his job as senior city planner for San Ramon. Before this summer, Weber and former deputy superintendant Jim Solberg ran a successful school building program that found money to build and maintain schools, while other school districts struggled with year-round schools and run-down facilities.

The program's successes included finding funds for the $10.7 million California High School expansion, the $11.8 million new Charlotte Wood Intermediate School and the $1.7 million new Del Amigo High School.

Weber said he was looking forward to working with Solberg in their new consulting company, Golden State Planning Group, which will advise school districts on how to get money from the state to build schools. Weber said he will also be a real estate broker.

Weber was one of three administrators who have publicly criticized Streshly. The others were Solberg and former business manager, Jim Tanner. Both retired last summer, after complaining of diminished roles in the district. In the past year, Weber took on Streshly over the budget deficit, and management morale.

Although Weber is leaving at the end of this month, he remains an employee until Dec. 31 because of accumulated vacation time.

Appendix 7

GOLDEN STATE PLANNING GROUP
383 Diablo Road, Suite 100
Danville, CA 94526
415 - 743-0499

Principal Consultants

James R. Solberg, Ph.D.
Vern Weber

November 6, 1989

Dr. William A. Streshly, Superintendant
San Ramon Valley Unified School District
699 Old Orchard Drive
Danville, CA 94526

Dear Bill:

I could not have been more surprised when I received your letter of November 1, as it is my understanding that everything is agreed to and finalized. I'm sure that my explanation of the facts will clarify the issues you raised.

It may be a technical point, but I did not resign my position; I announced my retirement — contingent upon the approval of specific conditions. Those conditions were approved, as I have signed copies of all documents, and my retirement letter is therefore valid and legal. As a retiree I am eligible to continue my benefit package, which I intend to do at my expense until I turn 55, when the District will continue to provide the benefits at its cost. There will therefore be no hiatus in coverage as you indicated.

My consultant contract is effective January 1, 1990, coinciding with the first day of my retirement. That contract is for my services through Golden State Planning Group, of which I am a part. It was your attorney, Sandra Wolliver, who suggested that Gary Gibbs' name be added to the contract since, at that time, Golden State was in his name as an

individual. In an October 19 memo to Jim O'Connor I explained that Gary would rather not sign the contract because of a possible conflict of interest, and stated that Golden State would be incorporated by me prior to January 1 and that my name could be added to the Fictitious Business Name Statement in the meantime if there was a problem. Jim told me to forget about Gary's signature as it wasn't necessary.

All this is a rather moot point now, however, since with Gary's decision to disassociate himself from Golden State Planning Group, he abandoned the use of the name of November 1, and I immediately placed it in my name (copies attached). I am therefore the sole owner, and my signature on the contract alone is valid and legal. I also have the name reserved at the State and still intend to incorporate before January 1, when my contract with the District takes effect.

I fail to see any contradiction between the joint press release we signed and the article that appeared in the San Ramon Valley Times on October 24. Everything that we said in the press release was and is true. While I feel that the article that appeared in the paper was a distortion of the interview I had, I did not criticize the District or anyone connected with the District. The article included many statements and items that did not come from me, but the material that did come from me is true. I would have preferred to see a more positive article, as I feel very positive about the shift from being an employee to being a consultant, but I will not lie to the press in response to a direct question. There were many positive things that I asked Kay to print, which she did not include, but I know no way to direct the press in the inclusion or exclusion of news items in an article or its headline, especially material drawn from other sources. I prepared a response to the Times on the article after it appeared in print, but upon reflection I decided to let things

go and to put my energy into proceeding on a direct positive note rather than risk stirring the pot. Thus my November 1 letter to the Board of Education and you. I offer you my comments on the article in way of explanation, but it should also be understood that my public comments in no way relate to the terms of my retirement or contract.

Bill, I hope that this letter and material resolve the issues you raised to your satisfaction. I truly hope that we can look toward the future and not the past for our own peace of mind as well as to enable us to get on with the critical work which lies ahead.

Sincerely,

Vern Weber

cc: Jim O'Connor
Mike Halloran